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Board of Appeals Case No. S-2796
(OZAH Case No. 11-18)

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

Petition No. S-2796, filed on November 30, 2010, seeks a special exception, pursuant to §59-G-2.00 of the Zoning Ordinance, to permit an accessory apartment use in the basement of an existing single-family home located at 8312 Woodhaven Boulevard, Bethesda, Maryland, on land in the R-90 (Residential, One-family, Detached) Zone. The property's legal description is Lot 9 and Part of Lot 8, Block E of the Woodhaven Subdivision of Bethesda. The tax account number is 00631122.

The Hearing was scheduled for April 8, 2011, by notice dated January 6, 2011 (Exhibit 11). One anonymous letter, dated December 5, 2010, was filed by the "neighbors" raising some issues, but not specifically opposing the special exception petition. Exhibit 12. Technical Staff at the Maryland-National Capital Park and Planning Commission (M-NCPPC), in a report issued April 1, 2011, recommended approval of the special exception, with conditions. Exhibit 13.¹

The Department of Housing and Community Affairs (DHCA) inspected the property on April 1, 2011. Housing Code Inspector Cynthia Lundy reported her findings in a memorandum dated April 4, 2011 (Exhibit 14). Ms. Lundy measured the habitable space of the apartment as 833 square feet, but because of uncertainty at the time as to the final floor plan, the inspector was unable to determine permitted occupancy. Also submitted by DHCA was a memorandum dated April 6, 2011, from Ada DeJesus of DHCA noting that there are no accessory apartments or registered living units in the neighborhood. Exhibit 16.

A public hearing was convened on April 8, 2011, as scheduled, and Petitioner appeared *pro se*. Also testifying was DHCA Inspector Cynthia Lundy. Petitioner executed an affidavit of posting (Exhibit 17), and generally adopted the findings in the Technical Staff Report (Exhibit 13), as Petitioner's own evidence (Tr. 8).² He also agreed to meet all the conditions set forth in the Technical Staff report and to make the repairs required by DHCA. Tr. 10 and 24.

¹ The Technical Staff report is frequently quoted and paraphrased herein.

² Petitioner differed from Staff only with regard to the relative sizes of the main house and the accessory apartment.

The record was held open till May 31, 2011, to await the filing of Petitioner's deed and a revised floor plan, as well as a supplemental report from DHCA. On April 22, 2011, Petitioner timely submitted a statement outlining proposed improvements to the accessory apartment (Exhibit 18(a)); a copy of his deed (Exhibit 18(e)); a floor plan showing the main floor of his home (Exhibit 18(b)); measurements showing the size of the main floor as 1443.5 square feet (Exhibit 18(c)); a revised floor plan for the accessory apartment (Exhibits 18(d)); and photos of the apartment (Exhibits 18(f) – (m)). After discussions with DHCA, Petitioner, on May 24, 2011, submitted a further revision to the proposed floor plan (Exhibit 19) and an e-mail outlining further changes to the accessory apartment (Exhibit 19(a)). On May 27, 2011, DHCA filed a revised report concerning the apartment (Exhibit 20) and an e-mail (Exhibit 21) indicating DHCA's approval of the revised floor plan.

The record closed, as scheduled, on May 31, 2011.

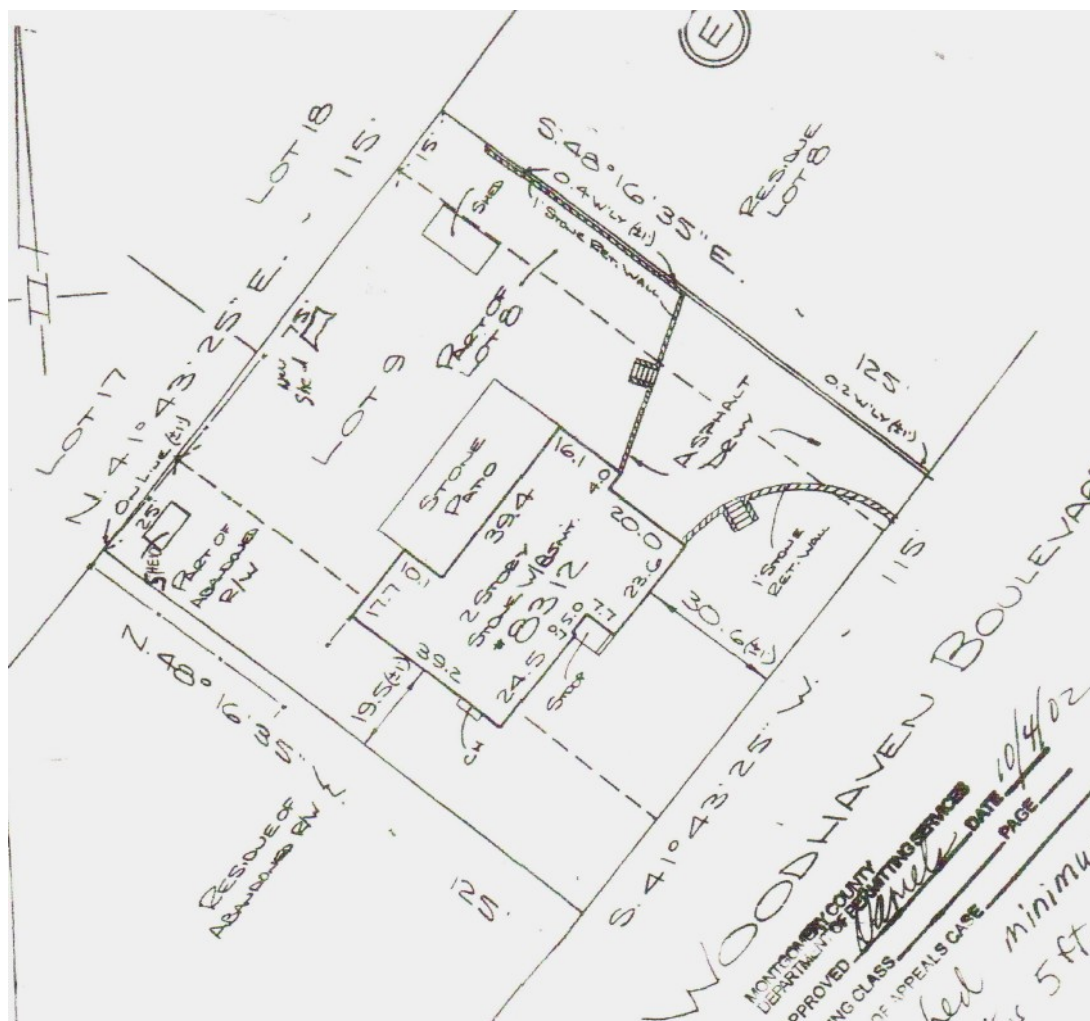
There is no opposition to this special exception,³ and the petition meets all of the statutory criteria. The Hearing Examiner therefore recommends that the petition be granted, with conditions.

II. FACTUAL BACKGROUND

A. The Subject Property and the Neighborhood

The subject property is located at 8312 Woodhaven Boulevard, Bethesda, Maryland, in the Woodhaven Subdivision, between Whittier Boulevard and Hawthorne Road. The home is in the R-90 Zone, on a 14,375 square-foot lot. Staff reports that the subject property, known as Lot 9 and part of Lot 8, Block E of the Woodhaven Subdivision, also contains an abandoned right-of-way (Holmes Road). The lot is generally rectangular in shape, as is depicted in the site plan (Exhibit 4), which is reproduced on the next page.

³ The letter of December 5, 2010 (Exhibit 12) was anonymous and therefore was not admitted into evidence.



The single-family dwelling on the lot is described by Technical Staff as follows (Exhibit 13, pp.

2-3):

The existing house was constructed in 1950. According to Maryland tax records, the two-story home is 1,939 square feet in size.⁴ The house is stone, and is located on gently-sloping land that decreases in elevation towards Woodhaven Boulevard. The backyard is mostly clear and is not fenced. Existing landscaping is relatively well-maintained. The site has its sole access point from Woodhaven Boulevard. The home has a two-car garage, and there is ample space for extra parking on the driveway. Additionally, street parking is acceptable along both sides of Woodhaven.

⁴ The size of the home was raised by Technical Staff as an issue (Exhibit 13, pp. 1 and 16) because Zoning Ordinance §59-G-2.00(a)(9) requires that the accessory apartment be “subordinate” to the main dwelling, and the proposed size of the apartment (1,065 square feet) appeared to be more than half of the total floor area recorded in the State tax records. Petitioner addressed this issue to the satisfaction of the Hearing Examiner in Exhibits 18(b) and (c), which demonstrate that the size of the main floor is 1443.5 square feet, clearly greater than the size of the proposed apartment.

The home can be seen in the following photographs provided by Technical Staff (Exhibit 13, pp. 3 and 4) and Petitioner (Exhibit 9(b)):



Front of House



Back of House

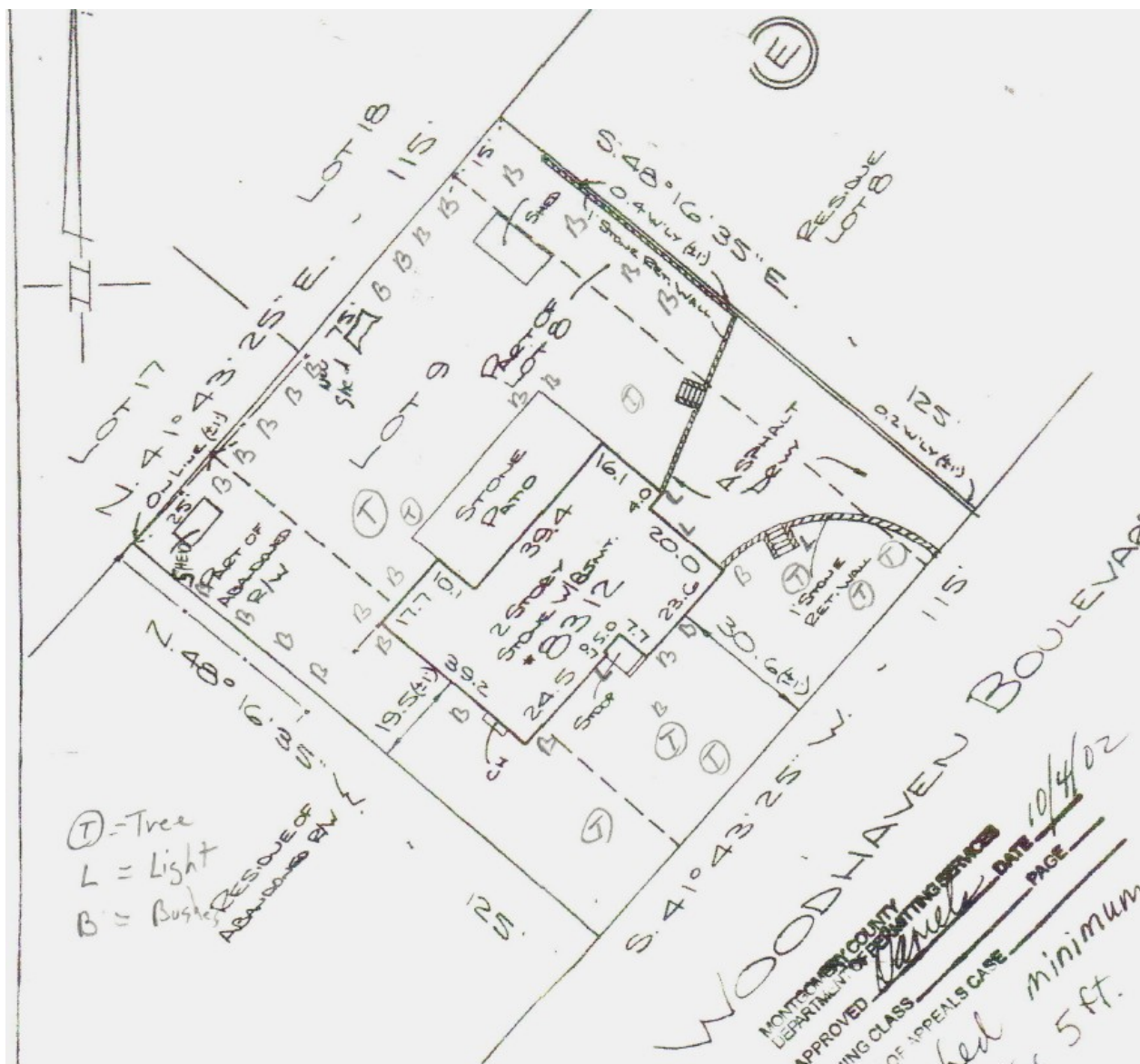


Driveway/Parking



Driveway/Side of House/Garage

Technical Staff reports that the property's landscaping is relatively well-maintained and falls within the standards expected for a typical single-family home. Exhibit 13, p. 7. In addition, the provided lighting is residential in character. Exhibit 13, p. 12. Petitioner testified that he does not plan to add any additional lighting or make any exterior changes, other than what the housing code inspectors require. Tr. 32-33. The location of landscaping and lighting is shown on the next page in the "Landscape and Lighting Plan" (Exhibit 5):



According to Technical Staff, there are no environmental issues or concerns associated with the applicant's proposed accessory apartment. Exhibit 13, p. 7. The site is exempt from the forest conservation law, as certified by Environmental Planning Staff (Exhibit 7).

Technical Staff defined the general neighborhood as bounded by Whitman Drive to the northwest, Whittier Boulevard to the east, the one-family homes along the southern side of Woodhaven Boulevard to the south, and Hawthorne Road to the west. Exhibit 13, p. 5. The Hearing Examiner accepts this neighborhood definition, and it is shown below on a Map supplied

by Technical Staff (Exhibit 13, p. 5):

Neighborhood Boundary



According to Technical Staff (Exhibit 13, p. 5), all homes in the neighborhood are one-family detached homes, and the entire neighborhood is zoned R-90. The neighborhood boundary, which is depicted with a dashed line on the map above, has been drawn to include any nearby properties that may be affected by a potential increase in density or traffic. No other special exceptions exist within the neighborhood boundaries. A memorandum from DHCA (Exhibit 16) specified that there were no other accessory apartments or registered living units in the area.

B. The Proposed Use

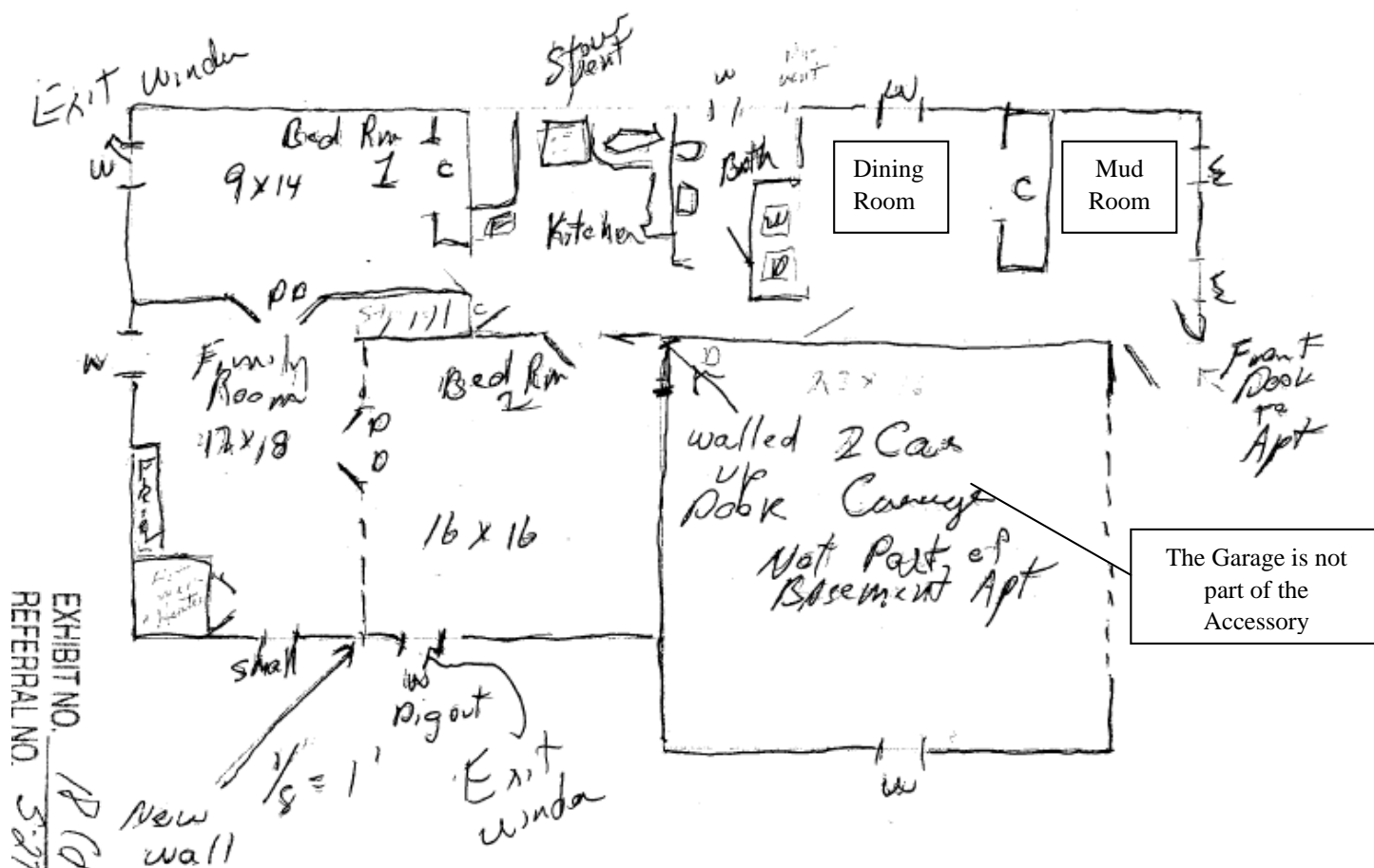
The Petitioner is seeking a special exception to allow an accessory apartment in the basement of his existing home. A separate entrance to the proposed accessory apartment is located in the east side of the residence, next to the garage, as shown in a photograph taken by Technical Staff (Exhibit 13, p. 4).

Accessory Apartment Entrance at Side of Home



As noted by Staff, “the accessory apartment entrance is clearly distinct from the entrance to the main dwelling and has the appearance of a typical side entry into a single-family home.” Technical Staff opined that the accessory apartment entrance should not detract from the appearance of the neighborhood. “Adequate lighting, residential in character, is located above the entrance to the accessory apartment and will illuminate the apartment entrance from the driveway.” Exhibit 13, p. 5.

The proposed accessory unit measures approximately 1065 square feet, according to Petitioner (Exhibit 3), although the Housing Code Inspector determined that only 833 square feet of the space is habitable (Exhibit 20). The living space includes a family room, a kitchen, a dining room, a mud room, two bedrooms, and a bathroom, as shown on the following revised Floor Plan (Exhibit 19):



The Department of Housing and Community Affairs (DHCA) inspected the property on April 1, 2011, and Housing Code Inspector Cynthia Lundy reported her findings in a revised memorandum dated May 27, 2011 (Exhibit 20). Those findings are set forth below:

The preliminary inspection was conducted on April 1, 2011. The accessory apartment is located in the cellar of the house. The issues regarding accessory apartment standards are as follows:

1. Must construct a masonry (concrete) wall that covers the entire door that leads to the garage
2. Must install a wall that completely separates the 'living-room' from the sleeping area
3. Must install a window in the sleeping area that is at least five (5) square feet in net clear opening and must be able to open without the use of a tool with a minimum net clear height of 24 inches, and a net clear opening width of 20 inches, with the bottom of the opening not more than 44 inches above the floor *(a window that opens down or otherwise blocks the way out is unacceptable)
4. The smoke detector must be secured to the wall or ceiling in the family room (area currently used as the master bedroom)
5. Must not use for sleeping any area of the unit that houses a gas dryer system
6. Interior glass doors must provide privacy
7. Must install a wall with built-in door to utilize the front entrance area for sleeping
8. The kitchen stove burners must be functioning properly
9. Must repair or replace the exterior light at the entrance door
10. Must remove all debris including, but not limited to dead branches, license tags, glass, construction debris and organic waste
11. Must install louvered doors to furnace area or install door vents to insure proper ventilation
12. Must paint all exterior wood trim

NOTE: The total habitable space measures 833 square feet. The dwelling can be occupied by a family of four (4) or two (2) unrelated individuals.

There is a driveway that extends a length of 70 feet by 14 feet with 25 by 25 feet of area in front of the garage. Total square footage is 1605. (Cars can be parked "side-by-side".) There is adequate off-street parking.

Petitioner has indicated his willingness to make the repairs required by DHCA (Exhibit 19(a)), and has already completed a number of the repairs. Tr. 24. DHCA has stated its approval of the revised floor plan submitted by Petitioner. Exhibit 21. Based on that revised floor plan, DHCA indicated that the habitable space in the accessory apartment of 833 square feet, would allow for the occupancy of no more than a family of four (4) or two (2) unrelated individuals, as indicated in the above quoted memorandum (Exhibit 20).

The photographs reproduced on the next page (Exhibits 18(g), (l), (h) and (s)) depict the accessory apartment rooms specified in their captions:



Technical Staff discussed the transportation issues at pages 6-7 of their report (Exhibit 13), stating:

The proposed accessory apartment meets the transportation related requirements of the Adequate Public Facilities (APF) Ordinance. The existing one-family dwelling is estimated to generate one peak-hour trip during the weekday morning and evening peak-periods. Since the number of peak hour trips, when combined, will generate fewer trips than the threshold figure requiring a traffic study (30 peak-hour trips), the proposed accessory apartment passes the Local Area Transportation Review (LATR). Policy Area Mobility Review (PAMR) is not required because the accessory apartment will generate less than four new peak-hour trips within the weekday morning and evening peak periods.

Vehicular access to the existing house and accessory apartment will be through the home's driveway. Parking for the main dwelling and the accessory apartment can be accommodated through the two-car garage and driveway, which together provide at least five parking spaces. Additionally, street parking is

acceptable on Woodhaven Boulevard. The special exception will not have an adverse effect on vehicular and pedestrian access or pedestrian safety.

Petitioner indicated at the hearing that he and his children have a total of five cars on site and the accessory apartment tenants have two cars; however, the driveway holds four cars, the garage holds two cars and there is ample space in front of his house for five cars. Tr. 15-17.

The Housing Inspector's report (Exhibit 20, ¶ 2) indicates that there is adequate off-street parking, and Housing Code Inspector Cynthia Lundy confirmed this at the hearing. She added that there is ample on-street parking in front of Petitioner's house, as well, because his property actually stretches a substantial distance on that block. According to Ms. Lundy, if Petitioner were to have four cars parked in front of his house, it would not interfere with anyone else in the neighborhood. Tr. 67.

Given this evidence, the Hearing Examiner finds that the proposed accessory apartment will not unduly burden local transportation facilities and that there is adequate parking to accommodate both the owners and the accessory apartment tenant.

Based on this record, the Hearing Examiner finds that the proposed special exception will not cause non-inherent adverse effects in the neighborhood warranting denial of the petition.

C. Neighborhood Response

There has been no admissible evidence from the community, either positive or negative to the subject petition. The Hearing Examiner, to ensure fairness, does not consider anonymous submissions, such as Exhibit 12, to be admissible evidence, although Petitioner chose to respond to some of the allegations in the letter at the hearing. Tr. 12-15. There is no opposition in the case.

D. The Master Plan

The subject property lies within the *1990 Bethesda Chevy Chase Master Plan*. Exhibit 8. Technical Staff advises that there are no Master Plan recommendations specific to this site. Exhibit

13, p. 6. However, the Master Plan does recommend special exception uses “that contribute to the housing objectives in the Master Plan” (p. 31, ¶ numbered 4). In fact, the Plan specifically “endorses expanding choices of housing types by provision of accessory apartments” (p. 33, ¶ numbered 4).

An accessory apartment would maintain the existing scale and type of housing, while providing for additional housing in the area. Technical Staff therefore found the proposed use to be consistent with the *Bethesda-Chevy Chase Master Plan*, as does the Hearing Examiner.

This accessory apartment would not be visible from the street and therefore would not change the existing structure’s appearance as a single-family dwelling compatible with the surrounding neighborhood.

Thus, it is fair to say that the planned use, an accessory apartment in a single-family, detached home, is not inconsistent with the goals and objectives of the *Bethesda Chevy Chase Master Plan*.

III. SUMMARY OF HEARING

At the hearing, testimony was heard from Petitioner Ramon Zeender and from Housing Code Inspector Cynthia Lundy.

Ramon Zeender:

Petitioner executed an affidavit of posting (Exhibit 17), and generally adopted the findings in the Technical Staff Report (Exhibit 13) as Petitioner’s own evidence (Tr. 8).⁵ He also agreed to meet all the conditions set forth in the Technical Staff report and to make the repairs required by DHCA. Tr. 10 and 24.

Petitioner testified that he lives in the house, as do two of his grown daughters, two grand

⁵ Petitioner differed from Staff only with regard to the relative sizes of the main house and the accessory apartment, an issue which he addressed at the hearing and in later submissions.

children and the “significant other” of one of his daughters. He does not charge them rent. Tr. 12-13. He receives rent only from the three occupants of the accessory apartment, a husband, wife and their ninth grade son. Tr. 14-15.

Petitioner has one car at the site; his daughters each have two cars located on site; and the tenants also have two cars, for a total of seven vehicles. The driveway holds four cars and the garage holds two cars. The tenants park generally in the driveway or in front of the house, on the street. However, parking is permitted on the street, and the frontage of his home is much longer than anybody else's in the neighborhood, allowing the parking of five cars in front of his house without bothering anybody else's front yard, or parking on the other side of the street. Generally two or three cars are parked in the driveway, and four on the street. Tr. 15-17.

Petitioner has indicated his willingness to make the repairs required by DHCA, and has already completed a number of the repairs, although he contends that he does not have wood debris in his yard, and he needs a place where he can split and pile wood. Tr. 24.

Petitioner also explained that the 1,900 square feet in the tax records is the first and second floor, and does not include the basement where the apartment is located. The first and second floor and garage outweigh the basement apartment hugely. Tr. 26-28. Petitioner also described the rooms in the accessory apartment. Tr. 29-32.

Petitioner identified his site, landscape, and lighting plans, as well as the photos in Exhibits 9(a) and (b). He indicated that the external lighting is typical residential lighting and that he does not plan to add any additional lighting or make any exterior changes, other than what the housing code inspectors require. Tr. 32-36.

Housing Code Inspector Cynthia Lundy:

Housing Code Inspector, Cynthia Lundy, testified that she inspected the premises on April 1, 2011, and that her findings are set forth in her report of April 4, 2011 (Exhibit 14). Tr. 37-38. Ms. Lundy described the various issues and explained that there was some confusion with Petitioner because this was a complicated site, involving numerous inspectors, and they tried to give Petitioner options. One remaining issue was what he had to do to properly separate the garage from the accessory apartment. The Hearing Examiner decided to have Petitioner submit a revised floor plan, in consultation with DHCA, and for DHCA to review and approve that revised plan. Tr. 39-65; 72-79.

Ms. Lundy further testified that there is ample parking out in front of Petitioner's house, and his property actually does stretch a substantial amount on that block. According to Ms. Lundy, if Petitioner were to have four cars parked in front of his house, it wouldn't interfere with someone else. Tr. 67.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioner will have satisfied all the requirements to obtain the special exception, if he complies with the recommended conditions (Exhibit 13).

Weighing all the testimony and evidence of record under a "preponderance of the evidence"

standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with an accessory apartment. Characteristics of the proposed accessory apartment that are consistent with the “necessarily associated” characteristics of accessory apartments will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with accessory apartments, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff lists the following inherent characteristics of accessory apartments (Exhibit 13, p. 9):

- (1) the existence of the apartment as a separate entity from the main living unit but sharing a party wall with it;
- (2) the provision within the apartment of the necessary facilities, spaces, and floor area to qualify as a habitable space under the applicable code provisions;
- (3) a separate entrance and walkway and sufficient exterior lighting;
- (4) sufficient parking;
- (5) the existence of an additional household on the site with resulting additional activity including more use of outdoor space and more pedestrian, traffic, and parking activity; and
- (6) the potential for additional noise.

The Hearing Examiner concludes that, in general, an accessory apartment has characteristics similar to a single-family residence, with only a modest increase in traffic, parking and noise that would be consistent with a larger family occupying a single-family residence. Thus, the inherent effects of an accessory apartment would include the fact that an additional resident (or residents) will be added to the neighborhood, with the concomitant possibility of an additional vehicle or two.

Technical Staff found (Exhibit 13, pp. 9-10):

In the instant case, there are no adverse effects that will negatively impact the community above and beyond those necessarily inherent to an accessory apartment. The apartment will be located in the basement of the main dwelling and is non-identifiable from the street. The apartment is set up to provide all the spaces and facilities necessary for an apartment use.

The accessory unit has a separate entrance apart from the main dwelling. The apartment entrance is typical of a side-entry to a single-family house, making it difficult to distinguish from any other neighborhood home. The walkway and grounds of the accessory apartment will be safe and illuminated while remaining consistent with typical residential standards.

Parking for the accessory apartment will be sufficient. . . . There are adequate choices to ensure sufficient neighborhood parking even with the existence of an additional household on the block.

Based on these findings, Staff concluded (Exhibit 13, p. 10):

The operational and physical characteristics of the proposed accessory apartment are consistent with the inherent characteristics of an accessory apartment use. There are no non-inherent adverse effects present in this case.

The Hearing Examiner agrees with Staff's assessment. Considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes, as did the Technical Staff, that there would be no non-inherent adverse effects from the proposed use.

B. General Conditions

The general standards for a special exception are found in Zoning Code §59-G-1.21(a). The Technical Staff report, the Housing Code Inspector's report, the exhibits in this case and the testimony at the hearing provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: An accessory apartment is a permissible special exception in the R-90 Zone, pursuant to Code § 59-C-1.31.

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.00 for an accessory apartment, as outlined in Part C, below.

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation

in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The subject property is covered by the *Bethesda Chevy Chase Master Plan*, approved and adopted in 1990. Technical Staff advises that there are no Master Plan recommendations specific to this site. Exhibit 13, p. 6. However, the Master Plan does recommend special exception uses “that contribute to the housing objectives in the Master Plan” (p. 31, ¶ 4). In fact, the Plan specifically “endorses expanding choices of housing types by provision of accessory apartments” (p. 33, ¶ 4).

An accessory apartment would maintain the existing scale and type of housing, while providing for additional housing in the area. Technical Staff therefore found the proposed use to be consistent with the *Bethesda-Chevy Chase Master Plan*, as does the Hearing Examiner.

(4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*⁶

Conclusion: The accessory apartment will be located in an existing dwelling and will not require any external changes. It therefore will maintain its residential character. There will be sufficient parking, considering the driveway and garage space, as well as the unusually long frontage of the site on a street with available parking. Traffic conditions will not be affected adversely, according to Transportation Planning Staff. There are no other accessory apartments in the neighborhood, and the addition of this use will not affect

⁶ This section was amended, as set forth here, by Zoning Text Amendment 10-13 (Ord. No. 17-01, effective 2/28/11).

the area adversely. Based on these facts and the other evidence of record, the Hearing Examiner concludes, as did Technical Staff, that the proposed use will be in harmony with the general character of the neighborhood.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: For the reasons set forth in answer to the previous section of this report, the special exception will not be detrimental to the use, peaceful enjoyment, economic value, or development of the surrounding properties or the defined neighborhood, provided that the special exception is operated in compliance with the listed conditions of approval.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Technical Staff found that “The use will cause no objectionable illumination or glare as the provided lighting is residential in character.” Exhibit 13, p. 12. Since the use will be indoors and residential, it will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. The Hearing Examiner so finds.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: As discussed above, the Hearing Examiner finds that the proposed special exception will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Technical Staff indicates that the subject site will be adequately served by existing public services and facilities (Exhibit 13, p. 13), and the evidence supports this conclusion.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception:⁷*
- (i) does not require approval of a new preliminary plan of subdivision; and*
 - (ii) the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception's impact;*
- then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision and there is no currently valid determination of the of adequacy of public facilities for the site, taking into account the impact of the proposed special

⁷ This section was amended, as set forth here, by Zoning Text Amendment 10-13 (Ord. No. 17-01, effective 2/28/11).

exception. Therefore, the Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. These standards include Local Area Transportation Review (LATR) and Policy Area Mobility Review (PAMR). As indicated in Part II. B. of this report, Transportation Planning Staff did do such a review, and concluded that the proposed accessory apartment use would add one additional trip during each of the peak-hour weekday periods. Exhibit 13, p. 13. Since the existing house, combined with the proposed accessory apartment, would generate fewer than 30 total trips in the weekday morning and evening peak hours, the requirements of the LATR are satisfied without a traffic study. Since the proposed use is estimated to generate only one additional peak-hour trip, PAMR is also satisfied. Therefore, the Transportation Staff concluded, as does the Hearing Examiner, that the instant petition meets all the applicable Growth Policy standards.

- (C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Based on the evidence of record, especially the Technical Staff's conclusion that "the proposed use is not likely to negatively impact the safety of vehicular or pedestrian traffic as the use will not generate a substantial increase in either form of traffic," the Hearing Examiner so finds. Exhibit 13, p. 13.

C. Specific Standards

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 13), provide sufficient evidence that the specific standards required by Section 59-G-2.00 are satisfied in this case, as described below.

Sec. 59-G-2.00. Accessory apartment.

A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:

(a) Dwelling unit requirements:

- (1) Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.*

Conclusion: Only one accessory apartment is proposed.

- (2) The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a separate accessory structure built after December 2, 1983, provided:*

- (i) The lot is 2 acres or more in size; and*
- (ii) The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.*

Conclusion: The apartment is located in the basement of an existing house, and therefore shares a wall in common, as required for a lot of this size (under an acre).

- (3) An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.*

Conclusion: No new addition or extension of the main dwelling is proposed. The accessory apartment will be located in an existing dwelling.

- (4) The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.*

Conclusion: The house was built in 1950. Exhibit 13, p. 15. It therefore meets the “5 year old” requirement.

(5) *The accessory apartment must not be located on a lot:*

- (i) *That is occupied by a family of unrelated persons; or*
- (ii) *Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or*
- (iii) *That contains any rental residential use other than an accessory dwelling in an agricultural zone.*

Conclusion: The proposed use does not violate any of the provisions of this subsection. The owner-occupants of the lot will comprise one household residing on the property. Except for the proposed accessory apartment, no other residential uses will exist on the lot.

(6) *Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.*

Conclusion: Access to the accessory apartment is through an existing side entrance to the home, on the lower level. There will thus be no change to the home's residential appearance.

(7) *All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.*

Conclusion: Petitioner is not proposing any new construction or modifications to the exterior of the dwelling.

(8) *The accessory apartment must have the same street address (house number) as the main dwelling.*

Conclusion: The accessory apartment will have the same address as the main dwelling.

(9) *The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet.*

Conclusion: Technical Staff raised an issue as to compliance with this section because the proposed size of the apartment (1,065 square feet) appeared to be more than half of the total floor area of 1939 square feet recorded in the State tax records. Petitioner addressed this issue at the hearing and in a post-hearing filing.

At the hearing, Petitioner explained that the 1,939 square feet in the tax records is

the first and second floor, and does not include the basement where the apartment is located. He testified that the floor area of the first and second floor and garage outweigh the basement apartment hugely. Tr. 26-28.

After the hearing, Petitioner submitted a floor plan of the first floor (*i.e.*, the main unit of his house) and a page of floor area calculations (Exhibits 18(b) and (c)), demonstrating that the size of the main floor is 1443.5 square feet, clearly greater than the size of the proposed apartment.

Based on this evidence, the Hearing Examiner finds that the accessory apartment is subordinate to the main dwelling and under 1,200 square feet, as it occupies approximately 1,065 square feet of space (833 square feet of which is habitable space) in Petitioner's existing 2508.5 square-foot home (1065 + 1443.5).

59-G § 2.00(b) *Ownership Requirements*

- (1) *The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.*

Conclusion: The Petitioner, his daughters and their family members will live in one part of the dwelling.

- (2) *Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the Petitioner, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.*

Conclusion: According to the deed (Exhibit 18(e)), Petitioner's purchase of the home was recorded in 1998. The one-year rule has therefore been satisfied.

- (3) *Under no circumstances, is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.*

Conclusion: The Petitioner will receive compensation for only one dwelling unit as a condition of the special exception.

- (4) *For purposes of this section owner means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the Board.*

Conclusion: The Petitioner is the owner of the property.

- (5) *The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.*

Conclusion: Not applicable.

59-G § 2.00(c) Land Use Requirements

- (1) *The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.*

Conclusion: The property's lot size is 14,375 square feet, exceeding the minimum standard.

Technical Staff reports that the subject property consists of more than one record lot; the property is comprised of Lot 9, part of Lot 8, and an abandoned Holmes Road right-of-way, all of which are shown on Woodhaven Subdivision Plats 1255 and 5484, recorded in 1940 and 1959, respectively. The home was lawfully constructed in 1950. Exhibit 13, p. 17. According to Staff, the subject property conforms to all applicable development standards of the zone because under §59-G-2.00(c)(1), a property consisting of more than one record lot is permitted to be treated as one lot if a home was lawfully constructed on the property before 1967. The home on the subject property was lawfully constructed in 1950. Exhibit 13, p. 8.

The following table summarizes the relevant development standards for the application. Exhibit 13, p. 8.

Development Standard	Min/Max Required	Provided	Applicable Zoning Provision
Maximum Building Height	2.5 stories	2 stories	§59-C-1.327
Minimum Lot Area	9,000 sq. ft.	14,375 sq. ft.	§59-C-1.322(a)
Minimum Lot Width at Front Building Line	75 ft.	116 ft.	§59-C-1.322(b)
Minimum Lot Width at Street Line	25 ft.	116 ft.	§59-C-1.322(b)
Minimum Setback from Street	30 ft.	30 ft.	§59-C-1.323(a)
Minimum Side Yard Setback	8 ft. one side; sum of 25 ft. both sides	19 ft south side; 35 ft. north side; 54 ft. sum of both	§59-C-1.323(b)(1)
Minimum Rear Yard Setback	25 ft.	Approx. 40 ft.	§59-C-1.323(b)(2)
Maximum Building Coverage	30 percent	Approx. 14 percent	§59-C-1.328
Maximum Floor Area for Accessory Apartment	1,200 sq. ft.	1,065 sq. ft.	§59-G-2.00(a)(9)

Based on this record, the Hearing Examiner finds that the subject property conforms to all applicable development standards of the zone.

(2) *An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in excessive concentration of similar uses, including other special exception uses, in the general neighborhood of the proposed use(see also section G-1.21 (a)(7) which concerns excessive concentration of special exceptions in general).*

Conclusion: As previously stated in this report, the Hearing Examiner concludes that the proposed special exception will not create an excessive concentration of similar uses since there are no other accessory apartments in the neighborhood.

(3) Adequate parking must be provided. There must be a minimum of 2 off-street parking spaces unless the Board makes either of the following findings:

- (i) More spaces are required to supplement on-street parking; or*
- (ii) Adequate on-street parking permits fewer off-street spaces. Off-street parking spaces may be in a driveway but otherwise must not be located in the yard area between the front of the house and the street right-of-way line.*

Conclusion: As discussed in Part II.B. of this report, there are at least four spaces on Petitioner's driveway and two in his garage. Moreover, there is ample space to park on the street along the frontage of his home. Although Petitioner and his family keep five cars at the site, and the accessory apartment tenants have two cars, the Hearing Examiner finds, based on this record, that there is sufficient parking available at the site.

D. Additional Applicable Standards

Not only must an accessory apartment comply with the zoning requirements as set forth in 59-G, it must also be approved for habitation by the Department of Housing and Community Affairs. As discussed in Part II. B. of this Report, the Housing Code Inspector's revised report (Exhibit 20) notes certain issues, and recommends that occupation of the accessory apartment be limited to no more than a family of four or two unrelated individuals. As mentioned above, Petitioner has agreed to meet all conditions, and will make the repairs required by the Housing Code Inspector.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2796, which seeks a special exception for an accessory apartment to be located at 8312 Woodhaven Boulevard, Bethesda, Maryland, be GRANTED, with the following conditions:

1. The Petitioner is bound by his testimony, representations and exhibits of record;
2. The Petitioner must make the repairs needed to comply with the conditions set forth in the Memorandum of Cynthia Lundy, Housing Code Inspector, Division of Housing and Code Enforcement (Exhibit 20):
 - a. Must construct a masonry (concrete) wall that covers the entire door that leads to the garage
 - b. Must install a wall that completely separates the 'living-room' from the sleeping area
 - c. Must install a window in the sleeping area that is at least five (5) square feet in net clear opening and must be able to open without the use of a tool with a minimum net clear height of 24 inches, and a net clear opening width of 20 inches, with the bottom of the opening not more than 44 inches above the floor *(a window that opens down or otherwise blocks the way out is unacceptable)
 - d. The smoke detector must be secured to the wall or ceiling in the family room (area currently used as the master bedroom)
 - e. Must not use for sleeping any area of the unit that houses a gas dryer system
 - f. Interior glass doors must provide privacy
 - g. Must install a wall with built-in door to utilize the front entrance area for sleeping
 - h. The kitchen stove burners must be functioning properly
 - i. Must repair or replace the exterior light at the entrance door
 - j. Must remove all debris including, but not limited to dead branches, license tags, glass, construction debris and organic waste
 - k. Must install louvered doors to furnace area or install door vents to insure proper ventilation
 - l. Must paint all exterior wood trim
3. Based on habitable space in the apartment (833 square feet), no more than a family of four or two unrelated individuals may reside in the accessory apartment;
4. Petitioner and/or his children must occupy one of the dwelling units on the lot on which the accessory apartment is located;
5. Petitioner must not receive compensation for the occupancy of more than one dwelling unit; and
6. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all

applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: June 28, 2011

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Martin L. Grossman". The signature is fluid and cursive, with a long horizontal stroke at the end.

Martin L. Grossman
Hearing Examiner